Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1174

MARC RICH & CO., A.G.,

Petitioner,

vs.

TRANSMARINE SEAWAYS CORP. OF MONROVIA,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Statement of the Case.

The "Questions Presented for Review" propounded by Petitioner assume facts which are contrary to the findings below. Petitioner therefore fails to cross the threshold of fact to reach any cognizable issue of law.

Petitioner's "Statement of the Case" is materially inaccurate in respect of at least three premises. First, it incorrectly states that arbitrator Nelson was an adversary of Petitioner in another matter. Second, it incorrectly states that Petitioner's expressed objections to Mr. Nelson included an alleged relationship between Mr. Nelson and

Respondent's counsel. Third, it incorrectly states that the decision below limited the definition of "bias" to cases involving affirmative business relationships between an arbitrator and a party.

During all of the arbitral and judicial proceedings, Petitioner repeatedly acknowledged Mr. Nelson's actual impartiality and integrity (46; 101; 108; 213; 234; 238),* but expressed an objection based on a mischaracterization of Mr. Nelson as the "managing agent" of the vessel Kissavos and a "litigant" in a dispute between Petitioner and the disponent owner of the Kissavos, Andros Compania Naviera S.A. ("Andros") (100). Mr. Nelson responded:

> "First off, I would like to correct Mr. Thomajan's impression.
>
> We are agents of [*sic*] the United States for the owners of the Kissavos, and the Kissavos case was referred to us by the owners in London, who made the charter, who negotiated the charter, who made the demand, and who gave us instructions, and we followed those instructions" (104).

The foregoing description of the very limited nature of Mr. Nelson's involvement with the Kissavos was not news to Petitioner. It had already been the subject of affidavits in connection with Petitioner's challenge to the Kissavos arbitration award on the grounds of an alleged relationship between Mr. Nelson and one of the Kissavos arbitrators (117). There, Petitioner failed even to raise a genuine issue of fact to warrant discovery, much less to prove the alleged intimacy between Mr. Nelson and Andros. *Andros Compania Naviera S.A.* v. *Marc Rich & Co. A.G.*, 579 F. 2d 691 (2d Cir. 1978).

*All references are to the Joint Appendix submitted in the Court of Appeals and certified to this Court.

In the Kissavos case, Petitioner conceded that Mr. Nelson's employer ("Orion") is merely an agent for Andros, not its manager, and that Mr. Nelson has no equity interest in Orion. *Andros Compania Naviera S.A.* v. *Marc Rich & Co. A.G., supra,* 579 F. 2d at 696. The Court of Appeals there noted that "Andros claims that Orion's involvement was minor and ministerial" 579 F. 2d at 701, and concluded:

> "Whatever Orion's duties were with respect to the Kissavos, Orion had no direct financial stake in the outcome of the arbitration, and Nelson's interest was even more attenuated." 579 F. 2d at 701.

A more detailed description of Orion's merely ministerial role for Andros and the Kissavos is found in a decision which denied personal jurisdiction over Andros. *Hoidas* v. *Orion & Global Chartering Co. Inc. et al.*, 440 F. Supp. 53 (S.D.N.Y. 1977).

Thus, while Andros may have been an adversary of Petitioner in the Kissavos arbitration, the same was not true of Orion or Mr. Nelson.

In the arbitration herein, Mr. Nelson also disclosed that a continuing business relationship exists between his employer's principals and Petitioner (114). Indeed, during the very pendency of the Kissavos dispute, Petitioner again chartered that same vessel from Orion's principal, Andros. See *Andros Compania Naviera S.A.* v. *Marc Rich & Co. A.G., supra,* 579 F. 2d at 703, n. 18. It is submitted that such a continuing relationship precludes any appearance of antipathy between Mr. Nelson, his employer, or their principals and Petitioner.

The so-called attorney-client relationship between Respondent's counsel and Mr. Nelson's employer's principals

was disclosed at the arbitration hearings (115), and Petitioner's counsel expressed no objection on that ground. On the contrary, after restating the objection to the alleged adversarial relationship between Mr. Nelson and Petitioner, counsel stated:

> "Except with the reservation I have indicated in the form of the comment made, we have no objection to the panel." (117-118).

Although mention was made in passing in the District Court of the existence of the so-called attorney-client relationship, never was an objection stated on that ground at the arbitration, in the action to disqualify Mr. Nelson prior to the evidentiary arbitration hearings (56-60), or in support of the petition to vacate the award (40-43). In the latter petition and supporting affidavits, the grounds relied upon were specifically said to be two. One was the argued unenforceability of an award upholding an allegedly coerced settlement agreement. The other was Mr. Nelson's supposed adversarial relationship with Petitioner (44; 216). No other grounds were cited.

It is significant to note that arbitrator Berg's employer is represented by Petitioner's counsel (116), but no objection whatever was raised to this very common relationship among the relatively few arbitrators and lawyers in the marine industry.

Finally, the District Court's decision did not purport to restrict the legal definition of bias to financial relationships, but found as a matter of fact that neither bias, nor its appearance, reasonably could be perceived in the remote relationships existing here:

> "Rich's sole complaint is that Nelson's company represented another company, which in turn asserted a claim (entirely unrelated to those at bar) against Rich. This is far too tenuous a relationship to require the disqualification of an experienced and respected maritime arbitrator, particularly where Rich offers no challenge to Nelson's personal integrity" (238).
>
> • • •
>
> "In the circumstances of this case, no one could 'reasonably' conclude that Nelson was biased against Rich. His participation in the prior, unrelated litigation is far too remote; and there is a total absence of that direct financial relationship, between arbitrator and a party to the arbitration, towards which *Commonwealth Coatings* and its progeny direct their particular attention" (239).

Reasons for Denying the Writ.

1. The decision below is not in conflict with decisions of this or any other Court.

It is inarguably true that a litigant is entitled to an actually impartial tribunal. Here, Petitioner has repeatedly acknowledged Mr. Nelson's actual impartiality and the integrity which he enjoys in the maritime industry (46; 101; 108; 213; 234; 238).

The statutory grounds upon which a court may vacate an award are exclusive and the burden of proving the existence of such grounds rests with the party seeking vacatur. *Reed & Martin Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268 at 1275 (2d Cir. 1971); *Saxis Steamship Co.* v. *Multifacs International Traders, Inc.* 375 F. 2d 577 (2d Cir. 1967).

The statutory grounds have not been expanded to include an "impression of possible bias" where there is an acknowledged absence of actual bias, as Petitioner would interpret *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U. S. 145 (1968).

Justice Black's plurality opinion in *Commonwealth Coatings* did not require disqualification of an arbitrator for dealings that might create an impression of bias, but only that such dealings be disclosed. 393 U. S. at 149. Upon disclosure, the standard for vacatur remains "evident partiality or corruption." 9 U.S.C. §10(b). See *Reed & Martin Inc.* v. *Westinghouse Electric Corp., supra,* 439 F. 2d at 1275; *Standard Tankers (Bahamas) Company Ltd.* v. *M.V. Akti,* 438 F. Supp. 153 at 159 (E.D.N.C. 1977); *Overseas Private Investment Corp* v. *Anaconda Co.,* 418 F. Supp. 107 at 110 (D.C.D.C. 1976).

Justice Fortas and the other dissenters construed the plurality opinion to mean that nondisclosure *per se* constatutes "evident partiality." 393 U.S. at 154. The dissenters would have agreed if nondisclosure were deemed merely to support a *prima facie* claim of partiality, albeit a rebuttable claim. 393 U.S. at 154.

Unlike *Commonwealth Coatings,* the present case involves no omission of disclosure, and the policy fostered by the disclosure requirement has in no way been contravened.

Further, disclosure does not afford a unilateral "veto" over an arbitral appointment to a party who purports to perceive an appearance of bias (petition, p. 7). Rather, a role is assigned to *both* parties, "who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business" 393 U. S. at 151. Petitioner, having acknowledged Mr. Nelson's unimpeachable ethics and reputation, may not gratuitiously "veto" his appointment.

2. The finding below is limited to its own facts.

All of the Justices in *Commonwealth Coatings* acknowledged that arbitrators' ties to the market place are not merely unavoidable, but are necessary and desirable as the base of experience which uniquely qualifies arbitrators to resolve commercial disputes. This is particularly true in the shrinking American shipping industry, where the community of businessmen and qualified arbitrators is small and substantive contacts among them is inevitable in a large proportion of cases (66; 238)*.

Whether such ties are too remote to constitute bias or create an impression of bias is a question of fact in each individual case. *Andros Cia. Nav. S.A.* v. *Marc Rich & Co. A.G., supra,* 579 F. 2d at 701; *Sanko S.S. Co. Ltd.* v. *Cook Industries Inc.,* 495 F. 2d 1260 at 1264, n. 3 (2d Cir. 1973).

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*Cases are numerous in which the interweaving nature of shipping relationships was reflected in the arbitral setting. See *Saxis Steamship Co.* v. *Multifacs Int. Traders Inc.,* 1967 A.M.C. 129 (E.D.N.Y. 1966), aff'd 375 F. 2d 577 (2d Cir. 1967); *Ilios Shipping and Trading Corp. S.A.* v. *American Anthracite and Bituminous Coal Corp.,* 148 F. Supp. 698 (S.D.N.Y. 1957), aff'd 245 F. 2d 873 (2d Cir. 1957); *Standard Tankers (Bahamas)* v. *M.V. Akti, supra; Stef Shipping Corp.* v. *Norris Grain Co.,* 209 F. Supp. 249 (S.D.N.Y. 1962); *Invoer-en Transp. "Invotra" N.V.* v. *Luria Brothers & Co. Inc.,* 1958 A.M.C. 886 (S.D.N.Y. 1958); *Petition of Dover Steamship Co. Inc.,* 143 F. Supp. 738 (S.D.N.Y. 1956); *Dulien Steel Products Inc.* v. *M.S. Ogeka,* 147 F. Supp. 167 (W.D. Wash. 1956); *Albatross Steamship Co.* v. *Manning Brothers Inc.,* 95 F. Supp. 459 (S.D.N.Y. 1951).

By reason of the recurring relationships among the participants in the maritime business (such as the continuing transactions between Petitioner and Mr. Nelson's employer's principals), shipping men cannot indulge in the sort of petty personal tensions which Petitioner seems to claim are inevitable in litigation. As recently noted by one of England's leading commercial judges, in a case where the issue was whether a retired solicitor and professional arbitrator was a "'commercial man":

> "The shipping and commodity trades of the world are unusual in that they do not regard litigation or arbitration with abhorrence. On the contrary, they regard it as *a normal incident of commerical life—a civilized way of resolving the many differences of opinion which are bound to arise.* Would that the same intelligent attitude were adopted within industry. As a result, a domestic arbitration service has grown up in London, which serves the shipping and commodity trades on a worldwide basis. I say 'domestic' because an important characteristic is that the arbitrators are not regarded as outsiders." *Pando Cia. Nav. S.A.* v. *Filmo S.A.S.*, [1975] 1 Ll.L.R. 560, 562 (Queens Bench Com. Ct. 1975). (Emphasis added.)

If anyone may be presumed to recognize arbitration to be a normal incident of commercial life, it is Mr. Nelson, whose experience as an arbitrator in 200 cases is unexceeded (249, n. 5). Therefore, the District Court found as a fact that Mr. Nelson cannot reasonably be believed to be biased.

3. Petitioner expressly waived any possible objection to the alleged attorney-client relationship.

With respect to the so-called attorney-client relationship, Petitioner's previous express acceptance of the arbitration panel precludes it from raising the issue now. *Cook Industries Inc.* v. *C. Itoh & Co. (America) Inc.*, 449 F. 2d 106 (2d Cir. 1971), cert. den. 405 U. S. 921 (1972); *Island Territory of Curacao* v. *Solitron Devices Inc.*, 356 F. Supp. 1, 12 (S.D.N.Y. 1973), aff'd 489 F. 2d 1313 (2d Cir. 1973); *Garfield & Co.* v. *Wiest*, 432 F. 2d 849 (2d Cir. 1970), cert. den. 401 U. S. 940 (1971).

Moreover, the relationship between Respondent's counsel and Mr. Nelson's employer's principals does not warrant a challenge to Mr. Nelson. *Saxis Steamship Co.* v. *Multifacs Int. Traders Inc., supra,* 1967 A.M.C. 129 at 132; *Texas Eastern Transmission Corp.* v. *R. L. Barnard,* 177 F. Supp. 123 (D. Ky. 1959), rev'd on other grounds 285 F. 2d 536 (6th Cir. 1960); *Standard Tankers (Bahamas) Co. Ltd.* v. *M.V. Akti, supra; Dulien Steel Products Inc.* v. *M.S. Ogeka, supra.*

In *Sanko S.S. Co.* v. *Cook Industries Inc., supra,* an attorney-client relationship was held insufficient to warrant vacatur of an award. Rather, the nondisclosure of that relationship, together with a misleadingly limited disclosure of the business relations between the arbitrator's employer and one of the parties, was cause for a remand to determine the true extent and effect of the relationships. In the present case, the so-called attorney-client relationship was disclosed by Mr. Nelson, and Petitioner did not pursue it (115).

It may also be noted that Petitioner errs in suggesting that Mr. Nelson was selected as arbitrator by Respondent's counsel, rather than by Respondent itself.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

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